IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

T.S. by her parents S.S. and T.S.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 99-1086-CV-W-SOW-ECF
	)	
LEE'S SUMMIT R-7 SCHOOL DISTRICT,	)	
	)	
Defendant.	)	

ORDER

Before the Court are defendant's Motion for Summary Judgment (Doc. #46), defendant's Suggestions in Support, plaintiff's Opposition, and defendant's Reply. For the reasons stated herein, defendant's motion is granted in part and denied in part.

I. Background

The material facts of the case, which are not in dispute, are as follows: Plaintiff T.S. is a seven-year-old female student who resides with her parents, S.S. ("Father") and T.S. ("Mother"), in the defendant Lee's Summit R-7 School District. T.S. has been diagnosed as autistic since November 15, 1996. She also suffers from a seizure disorder. T.S. began receiving special education and related services through the defendant school district in January of 1996. She was first identified as a student with a disability without a specific educational diagnosis being assigned to her.

In March of 1997, T.S.'s parents withdrew her from the defendant school district and enrolled her in the Lawrence, Kansas School District. There is disagreement between the parties as to the amount of progress T.S. made in the defendant school district between January of 1996

and March of 1997; however, no challenge to T.S.'s progress during that time period has been raised in the underlying proceedings.

T.S. attended school in Lawrence, Kansas until mid-March of 1998 when she was re-enrolled in the defendant school district. T.S. experienced a regression in pre-academic, social, language, and life skills at some point after she returned to the defendant school district, but prior to the beginning of the regular 1998-1999 school year. Both the parents and T.S.'s primary teacher for the 1998-1999 school year testified during the administrative hearing that they believed that T.S. was doing well and they were pleased with her progress until the time she returned to defendant school district for the Kindergarten program in the fall of 1998. There had been a three-week break between the end of the defendant district's Early Childhood Education summer school program and the beginning of the 1998-1999 school year. Ms. Laurel Bohl, T.S.'s occupational therapist during both the summer and fall of 1998 testified at the administrative hearing that T.S. had suffered a relapse or regression in skills between the summer session and the fall session.[1]

At the beginning of the 1998-1999 school year, T.S. entered Kindergarten at an elementary school in the defendant school district. Throughout the fall of 1998 and the spring of 1999, T.S. slowly recouped some of the skills lost in the regression. By the time T.S.'s individualized education program ("IEP") was constructed for the 1999-2000 school year in the spring of 1999, there were skills and achievements that had been previously recorded in T.S.'s records prior to her return to the defendant school district in March of 1998 which had not yet

[1]During the proceedings in this Court, the parents appear to be disagreeing with their previous testimony, taking the position that T.S.'s regression began as soon as she returned to the defendant district.

been recovered or regained.

On May 21, 1999, T.S.'s parents requested a special education due process hearing pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1415(f) and §162.961, RSMo. In response to the parents' request, a four-day administrative hearing was held in September of 1999. On October 14, 1999, the administrative hearing panel issued a unanimous opinion finding that there were no procedural violations by the defendant school district of such a substantial nature so as to constitute a failure to provide a free appropriate public education as required by the IDEA. The panel stated that there was "no preponderance of the evidence or satisfied burden of persuasion as to the cause of the child's regression;" however, because T.S. did regress during the period of time that she was under the educational care of defendant school district, the panel did order additional hours of instruction, including eight Saturday sessions during the school year and an extended summer program. Hearing Panel Order, p. 7, 10.

The hearing panel found that T.S. is receiving in excess of 35 hours per week of educational instruction and that she attends school five days per week for at least six hours per day. The panel found no evidence that the teachers or the experts employed by the defendant district were either unqualified or inexperienced in the educational treatment for an autistic child.

Plaintiffs have appealed the hearing panel's decision to this Court.[2] Previously, this Court granted defendant's motion for summary judgment to the extent that it sought dismissal of plaintiff's Count II, filed pursuant to the Family Educational Rights and Privacy Act ("FERPA"),

[2]Initially, plaintiffs sought a preliminary injunction. The Court determined that it would be preferable to expedite the entire case so as to resolve the issues between the parties prior to the beginning of the 2000-2001 school year. As a result, plaintiffs' motion for a preliminary injunction was stayed and this case was set for hearing on June 19, 2000. The Court's ruling today renders plaintiffs' motion moot.

34 C.F.R. Part 99 and 42 U.S.C. §1983, apparently in an effort to obtain a jury trial in this matter. At that time, the Court recognized that this is an appeal from an administrative decision specifically authorized pursuant to the IDEA, 20 U.S.C. §1415(i)(2)(B).[3] Defendant has filed a counterclaim seeking relief from the award of additional hours of instruction and the extension of T.S.'s summer program.

II. Standard

The underlying cause of action in this case is premised on the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 et seq. ("IDEA"). Pursuant to the IDEA, a parent has a right "to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(6). The complaint is heard in an impartial due process hearing conducted by the State or local educational agency. 20 U.S.C. §1415(f). In Missouri, this hearing is conducted before a three-person hearing panel empowered by the State Board of Education. Section 162.961.3, RSMo.

The chairperson of the hearing panel is an attorney who is specially trained to officiate at

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[3]The Court also dismissed Count II because it was a two-sentence claim and the Amended Complaint was devoid of any additional supporting allegations for Count II. Furthermore, there is no private right of action under FERPA. Girardier v. Webster College, 563 F.2d 1267 (8th Cir. 1977) and, assuming that a FERPA violation states a claim under 42 U.S.C. §1983, plaintiffs failed to allege or prove any of the essential elements of a §1983 cause of action. Even if defendant qualifies as a "person" for purposes of §1983 liability, plaintiffs would have to satisfy the requirements of Monell v. Department of Social Services, 436 U.S. 658 (1978). Plaintiffs had not pleaded any allegations stating that their alleged injury resulted from "action pursuant to official municipal policy of some nature." Id. at 691. In fact, plaintiffs failed to allege any injury resulting from the alleged delay in providing them with T.S.'s school records. Accordingly, the Court dismissed Count II of the Amended Complaint and informed the parties that no jury trial would take place. Instead, the Court afforded the parties an opportunity to orally argue their respective positions on defendant's motion for summary judgment and the hearing panel's ruling.

special education hearings. Id. The other two members of the hearing panel are selected by the parties and have expertise regarding individuals with disabilities.

Review of the state agency decision is provided for in the IDEA, allowing a civil action to be brought in this Court. 20 U.S.C. §1415(i)(2)(A). Pursuant to the IDEA, this Court:

> (i) shall receive the records of the administrative proceeding;
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> (ii) shall hear additional evidence at the request of a party; and
>
> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. §1415(i)(2)(B). The Eighth Circuit has recognized that:

> Under the IDEA, the reviewing court bases its decision on a "preponderance of the evidence." That is a less deferential standard of review than the substantial evidence test common to federal administrative law. But it still requires the reviewing court to give "due weight" to agency decision making.

Independent School Dist. No. 283 v. S.D., 88 F.3d 556, 561 (8th Cir. 1996)(quoting Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206 (1982)).

"Summary judgment is an appropriate tool in IDEA matters." Gill v. Columbia 93 School District, No. 2-98-04192, 31 IDELR 29 (W.D.Mo. June 9, 1999). The standard for summary judgment when conducting judicial review of an administrative decision under the IDEA is different in that it may be conducted on the administrative record even if there are disputed material facts. Breen v. St. Charles R-IV School District, 2 F.Supp.2d 1214, 1220 (E.D.Mo. 1997)(citing Independent School District No. 283 v. S.D., 88 F.3d 556 (8th Cir. 1996)).

III. Discussion

Initially, the Court notes that it has before it the administrative record filed by the State of Missouri Department of Elementary and Secondary Education. Neither party sought to present

evidence to the Court at the June 19, 2000 hearing; however, both parties attached supplemental documents and affidavits to various motions filed in this Court. This Court has previously declined to strike any of these documents or affidavits, ruling instead that it would consider these items to the extent they were relevant to the issues before the Court.

Plaintiffs contend that the administrative panel erred by refusing to order the defendant district to utilize certain teaching methods, with additional instructors and a "behavioral analyst" to oversee the implementation of this program. The hearing panel determined that plaintiffs' requested relief intruded into the area of teaching methodology and refused to "disturb the rule that gives the district discretion in that area." Hearing Panel Order at p. 7. The defendant district maintains that T.S. is receiving a free appropriate public education ("FAPE") as required by the IDEA and, accordingly, that plaintiffs are not entitled to the requested relief.

In passing the IDEA, "Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 192, 102 S.Ct. 3034, 3043, 73 L.Ed.2d 690 (1982). The "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Id. Once inside the door of a public education facility, a student with a disability is entitled to a free appropriate public education ("FAPE"). 20 U.S.C. §§1400(d)(1)(A) and 1412(a)(1)(A).

The IDEA defines a FAPE as follows:

The term "free appropriate public education" means special education and related

> services that -
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under [20 U.S.C. §1414(d)].

20 U.S.C. §1401(8).

The Eighth Circuit has described the purpose and requirements of the IDEA as follows:

> Although the IDEA mandates individualized "appropriate" education for disabled children, it does not require a school district to provide a child with the **specific educational placement that her parents prefer**. See E.S. 135 F.3D at 569. Nor does the IDEA require a school district to "either maximize a student's potential or provide the best possible education at public expense." Fort Zumwalt, 119 F.3d at 612.

Blackmon v. Springfield R-XII School Dist., 198 F.3d 648, 658 (8th Cir. 1999)(emphasis added). Rather, the "IDEA's requirements thus are satisfied when a school district provides individualized education and services sufficient to provide disabled children with 'some educational benefit.'" Id. (citing Rowley, 458 U.S. at 200, 102 S.Ct. 3034).

There is no question that defendant district is providing an individualized educational program and additional services to T.S. which are providing her with some educational benefit. As the hearing panel concluded, "This panel could not find any procedural violations by the district of such a substantial nature so as to constitute a failure to render FAPE to the child, ..." Hearing Panel Order, p. 5, ¶8. In fact, there does not seem to be a dispute between the parties that T.S. is making progress under the defendant district's program. Rather, plaintiffs are dissatisfied because T.S. has not recouped all of the skills she lost during the regression in the

summer of 1998; however, plaintiffs have not demonstrated by a preponderance of the evidence that the hearing panel erred in concluding that T.S. is receiving a FAPE.

Regrettably, T.S. suffered a regression in the summer of 1998. As the hearing panel concluded from the testimony at the administrative hearing, it appears that the regression was noted following a three-week break between the summer program and the fall semester. Whether the regression was caused by that break or some other factor or combination of factors is not known.

Plaintiffs wish to characterize T.S.'s progress in the defendant district since September of 1998 as "trivial" and move on to the issue of teaching methodology; however, if the defendant district is providing T.S. with a FAPE, there is no basis for either the hearing panel to have awarded, or for this Court to award, plaintiffs the relief they seek. E.S. v. Independent School Dist., No. 196, 135 F.3d 566, 569 (8th Cir. 1998)("As long as the student is benefitting from her education, it is up to the educators to determine the appropriate methodology.")(citing Rowley, 458 U.S. at 208, 102 S.Ct. at 3051-52)). The documentary exhibits and testimony introduced at the administrative hearing demonstrate that T.S. is making progress within the defendant district and benefitting from the education provided by the district. By the time the administrative hearing was conducted, T.S. was exhibiting skills that she had not been exhibiting at the beginning of the 1998-1999 school year. Some of these were skills previously lost in the regression while others were new skills. Documents provided to this Court indicate that T.S. is continuing to make progress, albeit perhaps not at the rate plaintiffs believe could be achieved through their expert's teaching methods; however, a school district is not required to implement a different methodology based upon the parents' preferences. E.S., 135 F.3d at 569 (citing Fort Zumwalt, 119 F.3d at

613).

In sum, the hearing panel determined that the defendant district is providing T.S. with a FAPE and that there was no violation of the IDEA. Upon reviewing the administrative record and the additional documents provided to this Court, it is this Court's conclusion that the preponderance of the evidence favors the hearing panel's conclusions. Accordingly, defendant's motion for summary judgment is granted to the extent that it seeks judgment on Count I of plaintiff's Amended Complaint.

Defendant's seek reversal of the hearing panel's order to the extent that it calls for an extended summer program for T.S. As previously discussed, the hearing panel determined that the evidence before it tended to show that T.S. regressed during the three-week break between the 1998 summer session and the commencement of the 1998-1999 school year. The hearing panel was unable to determine the cause of T.S.'s regression. Nevertheless, the panel ordered the defendant district to provide services to T.S. during the summer of 2000 in such a manner that she has no more than a two-week break without services. The Court declines to disturb the hearing panel's order, finding that it is a reasonable measure to prevent the type of regression suffered by T.S. in the summer of 1998. The defendant district's counterclaim on this point is denied.

IV. Conclusion

Accordingly, for the reasons discussed above, it is hereby

ORDERED that defendant's Motion for Summary Judgment (Doc. #46) is granted in part and denied in part. It is further

ORDERED that summary judgment on plaintiff's IDEA claim is granted. It is further

ORDERED that judgment is entered in favor of defendant as to plaintiff's Amended Complaint. It is further

ORDERED that judgment is entered in favor of plaintiff as to defendant's Counterclaim.

s/Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: 7-6-00